In the

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UNITED [redacted]

vs.

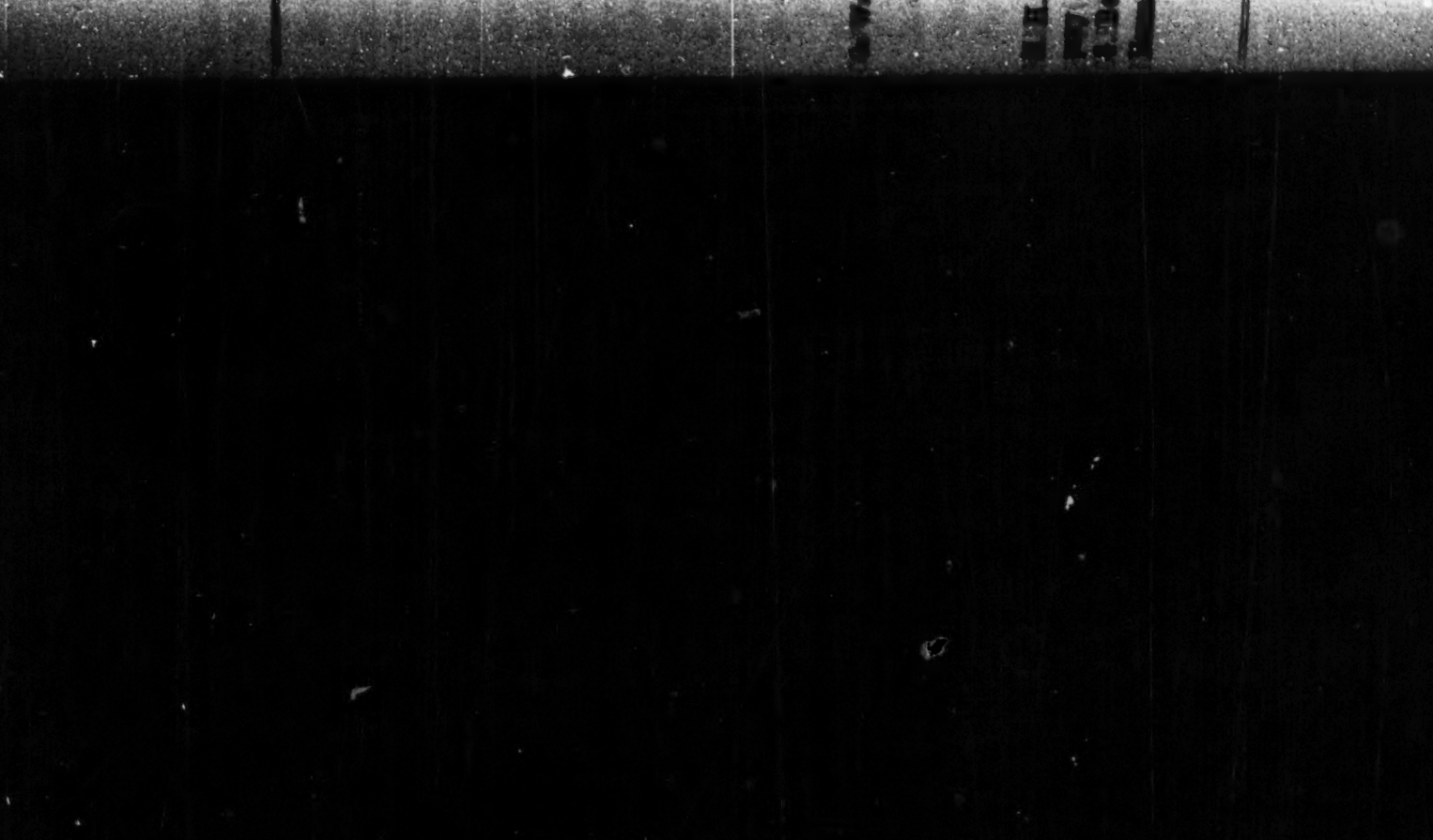
THOMAS E. POWERS, ET AL.,

[redacted]

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[redacted]

M. H. Tachirgi, Morton Tachirgi, Arthur Land Company (a Montana corporation), A. S. Belken, [redacted] G. Belken, Judy Walsh, H. G. Campbell, Jay L. Herman, Nichols Bethlehem, Mary Bethlehem, [redacted] Miller and Robert J. Miller.



No. 5102

In the Supreme Court of the United States

OCTOBER TERM, 1938

For the Ninth Circuit

UNITED STATES OF AMERICA,
Petitioner,

vs.

THOMAS R. POWERS, ET AL.,
Respondents.

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BRIEF FOR RESPONDENTS,

Tschirgi, Bertha Tschirgi, Antler Land Com- (a Montana corporation), B. B. Belken, Edith lken, Judy Walsh, H. G. Campbell, Jay L. n, Nickels Dethlefsen, Mary Dethlefsen, Billie Miller and Robert J. Miller.

BILLINGS GAZETTE, BILLINGS, MONTANA

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BRIEF FOR RESPONDENTS,

M. H. Tschirgi, Bertha Tschirgi, Antler Land Company (a Montana corporation), B. B. Belken, Edith G. Belken, Judy Walsh, H. G. Campbell, Jay L. Henman, Nickels Dethlefsen, Mary Dethlefsen, Billie Miller and Robert J. Miller.

NATURE OF CASE.

This is an action brought by the United States of America, as guardian for its Indian wards on the

Crow Reservation, wherein an injunction is sought against the respondents to restrain them from using or diverting the waters of Lodge Grass Creek and Little Big Horn River, located on the Crow Indian Reservation, Montana.

PETITIONER'S CONTENTION.

Petitioner alleges that there is a shortage of water in the Little Big Horn River and Lodge Grass Creek and that there is not sufficient water to properly irrigate the land lying under the six United States Indian Irrigation Service ditches and the Bozeman Trail ditch, a private ditch. The United States claims a superior right to the water in these two streams and contends that it is entitled to the exclusive use of such water, regardless of whether such ditches serve Indians or white owned land. (Petitioner's Brief p. 29.) Petitioner alleges that the respondents are using water from these two streams in the irrigation of land on the reservation and seeks to restrain the respondents from such use.

The legal position of the United States as set forth in Petitioner's Brief is as follows:

I.

(a) Both the land and the water of the Crow Tribe Reservation were "prior to some division or allotment in severalty" held "by the tribe in common ownership." (Petitioner's Brief 16.)

(b) The reservation of the waters, as determined

by the case of **Winters vs. United States**, 207 U. S. 564, 52 L. ed. 340, was for the Indian Tribe, as a tribe, and not for the individual Indians who were members of the tribe. (Petitioner's Brief 17.)

II.

(a) Congress, acting within its plenary powers, directed the allotment, patenting or sale of the reservation lands, in severalty, but retained the control of the water. (Petitioner's Brief 21-25.)

(b) The Secretary of the Interior was, by Sec. 7 of the Allotment Act of February 8, 1887 (24 Stat. 388, 1 Kappler 35) granted control of the waters of the Crow Indian Reservation and authorized to make distribution thereof. (Petitioner's Brief 25, 27.)

(c) The construction of Government Irrigation Systems, with tribal money, was an allocation of the waters to the lands under the project to the exclusion of lands, of similar status, which were not under the project. This position is set forth at page 28 of Petitioner's Brief in these words:

> "If Section 7 of the Allotment Act of 1887 did not place the control of all waters of the reservations in the Secretary of the Interior, the Act of March 3, 1891 (26 Stat. 1040, 1 Kappler 433) passed in pursuance of an agreement with the Crow Tribe and the construction of irrigation works under authority of that statute have set apart and reserved the waters in question for the lands under the system of irrigation so established. In no event would such reserved waters pass to allottees of lands which were not under this system."

Briefly stated, the petitioner's contention is that the water belonged to the Tribe, as a whole, and that the Tribe and Congress granted authority to the Secretary of Interior to allocate the waters to the lands of some Indians and refuse it to the lands of other Indians.

RESPONDENTS' CONTENTION.

The respondents are owners of lands on the Crow Indian Reservation which originally were the allotments of members of the Crow Tribe of Indians. The Indians to whom these lands were allotted have died and the United States, as guardian of the Indian heirs, sold the lands, at public sale, and at these sales the defendants, or their predecessors in interest, became the purchasers. These sales were made for the benefit of the Indian heirs of the original allottee, and the proceeds of the sales went to the Indian heirs. The United States issued a fee patent to the purchaser which patent conveyed the land,

> "together with all rights, privileges, immunities and appurtenances, of whatsoever nature, thereunto belonging"

and without any reservation of water or water rights. (R. 460, 484.)

In a few instances a fee patent to the lands was issued to the Indian and the Indian sold to these respondents. These patents are in the same form as

hose issued on Government sales and convey all of he appurtenances. (R. 487.)

The title vests in the respondents by mesne conveyance from the original patentees, which conveyances are warranty deeds conveying the "premises, ogether with all tenements, hereditaments and appurtenances" and without any reservation of water r water rights. (R. 462.)

The titles of the respondents are of the same legal tatus as those of the white owned lands under the Government projects.

Respondents contend, and petitioner admits, that nder and by virtue of the Treaty of May 7, 1868 (15 Stat. L. 649), the lands on the Crow Reservation were recognized as the common property of the Indians of he Crow Tribe. (Petitioner's Brief 15-17.)

By virtue of the same treaty, as interpreted by the **Winters case** (207 U. S. 564) the use of the waters of said reservation were reserved by the Indians for use on said land. The Government intended the individual Indians of the Crow Tribe to have a country upon which they could make a living by agricultural pursuit. Unless the water went with the land the purpose of the treaty would be defeated. It was evident, even then, that certain lands of the reservation were so situated that water from the streams could be run, by gravity, upon them for agricultural purposes.

Heretofore, the Indians had made their livelihood

by hunting and this mode of living need recognize no individual real estate rights; the buffalo and the deer roamed over all of the country and any member of the tribe had the right to pursue and take such game at any place on the common territory. But when the habits of the Indians were to be changed to those of an agricultural and pastoral people and they were to make their livelihood by farming, it was very evident that a common ownership of the real estate must cease. If they were to become farmers, and make their living from that source, it was necessary that they have lands capable of producing crops. In order to produce crops it was necessary that they have the irrigation water needed to grow the grain and food for themselves and their livestock.

The purpose of the Government was to break up the roaming, tribal existence of the Indian and to make him a rugged individualist. He was to be encouraged to own his own individual property, farm his own land and raise his own cattle. He was to take up the ways of the white man and become self-supporting. The Government told him, by the Treaty of 1868, that from the common tribal lands he would be given his equal proportion, which he was to possess and own in severalty. It was feared that, at first, he might not be capable of managing his own affairs and so the change was to be gradual and with the Government supervising his affairs until he was capable of managing them himself.

Under the 1868 Treaty the individual Indian was given the right to make a selection of the land he wanted. In due time a survey was to be made of the reservation and he was to be allotted the land chosen by him, unless his selection conflicted with the rights of others. And, later, a trust patent was to be issued to him designating the lands which were his. The title to these lands was to be held by the United States for a trust period of twenty-five years, during which period the Indian should have the right of possession, use and occupancy of the land and all the appurtenant rights. At the end of twenty-five years a fee patent was to be granted to the Indian making the land his absolutely.

When the lands were allotted to the individual Indian he ceased to have an interest in the common property so divided but took the lands allotted to him in severalty.

When he had no individual lands he had no use for individual water. When he took a parcel of ground which was capable of irrigation he had need for individual water for that land. The irrigable land without the water was valueless. The two went together. To say otherwise is to entirely defeat the policy of the Government and the intention of the Indian as expressed in all of the treaties and acts of Congress and as clearly set forth in the **Winters case.**

In 1901 Special Allotting Agent, John K. Rankin, was directed by the Government to allot certain sur-

plus lands on the reservation to the Crow Indian. He was informed that there was sufficient irrigable land on the Crow Reservation to give each Indian 40 acres of irrigable land and he was instructed to make his allotments so that each Indian would be given that amount of irrigable land. (R. 452.)

When the Government directed Rankin to allot to each Indian 40 acres of irrigable land it must have intended that he have sufficient water for that 40 acres, **otherwise he would not be receiving irrigable land.**

Rankin gave each Indian approximately 40 acres of such land and later when United States Allotting Agent, Roblin, reclassified the same lands **he designated as irrigable all lands capable of irrigation whether they were under a United States Irrigation Service project or private ditch.** (Exs. 18, 51.) (R. 459, 560.)

It is our contention that if all of the Rankin allottees had lived and retained their lands, each one, who was allotted irrigable lands (i. e., land capable of being irrigated by gravity), would be entitled to sufficient water to irrigate all of his land capable of irrigation; if there was not sufficient water to irrigate all of his irrigible lands, each Indian would then be entitled to his pro rata share of the available water. **Respondents firmly contend that neither the Government, the Secretary of the Interior nor the Commis-**

sioner of Indian Affairs could deprive any one Indian of his portion of the available water to the advantage of any other Indian. Neither could the Secretary of the Interior say that any one Indian or group of Indians were entitled to the first use of the waters. Each had a **vested right,** which could not be taken from him, to the use of sufficient water to irrigate his irrigable land.

The manner in which he transported his water to his land was the individual concern of each Indian. He could build his own ditch; join with others in constructing a common ditch; or if fortunate, talk the Government into using treasury and tribal moneys to build a ditch for him. **HIS RIGHT TO THE WATER MUST NOT BE CONFUSED WITH THE MEANS OF TRANSPORTING IT TO HIS LAND.**

The United States saw fit to construct irrigation systems which delivered one Indian's water to that Indian's land and neglected to construct irrigation systems to take the water belonging to another Indian to that Indian's land, but the latter fact did not increase or diminish the rights of the Indian owners of irrigable land to the use of their waters.

The building of irrigating systems was not an exercise of the delegated power to the Secretary "to secure a just and equal distribution thereof (water) among the Indians residing upon any such reservation." (Treaty of February 8, 1887, 1 Kappler 35,

24 Stat. 388.) Certainly no authority could ever be given the Secretary to deprive any Indian of his VESTED RIGHTS. The United States may be the guardian of the property of all the Indians, BUT NO GUARDIAN HAS THE RIGHT TO TAKE THE PROPERTY OF ONE WARD AND GIVE IT TO ANOTHER WARD.

Respondents further contend that the purchaser of the Indian title stepped into the shoes of the Indian allottee and, thereby, became entitled to th same pro rata share of the available water as his Indian predecessor.

LOGICAL CONCLUSIONS FROM THE EVIDENCE.

Respondents, Antler Land Company, Edith G. Belken, Judy Walsh, H. G. Campbell, Robert J. Miller, Billie Miller, Jay L. Henman, Ruth Henman, Nickels Dethlefsen and Mary Dethlefsen introduced evidence to prove and maintain the following facts and legal propositions:

1. That, by the Treaty of May 7, 1868 (15 Stat. L. 649), the United States recognized the lands of the Crow Indian Reservation as the property of the Crow tribe of Indians and by said treaty the waters of the reservation were reserved for the Indians of the Crow tribe. **(U. S. v. Winters,** 207 U. S. 564.)

2. That while the United States held the fee to the lands of the Crow Reservation, it had no interest in,

right or title to the said lands except as a holder of naked legal title, which title was held in trust solely for said Indians.

3. That at all times from and after May 7, 1868, the waters of said reservation were vested (as much as waters may be vested) in the Indians residing upon the Crow Reservation.

4. That by virtue of Section VI of the Treaty of May 7, 1868 (15 Stat. 649, 2 Kappler 1008), the individual Indians were granted the right to make "selections" of not to exceed 320 acres. The land thus selected was thereupon to cease being held in common but was to be occupied and held as the exclusive property of the Indian making this selection. The treaty provided that the President should make a survey of the reservation and Section XI thereof guaranteed the protection of the Indian in his selection.

5. That the act of April 11, 1882 (22 Stat. L. 42), which was based upon and carried out the promise of the treaty of May 7, 1868, provided for a survey of the reservation for allotments to the individual Indians, for the issuance of trust patents and finally fee patents.

6. That under the authority of the treaty of May 7, 1868, the act of April 11, 1882, and of the act of February 8, 1887 (24 Stat. L. 388), the following In-

dians made selections of lands which are now under the private ditch of Antler Land Company, to-wit: The Wolf, #1328; Little Face, #1349; Deaf, #1350; Medicine Horse, #1351; Gives Away, #1686; Young Duck, #1707; and Heifer Woman, #1708. Each of these Indians died prior to the allotments made by United States Special Alloting Agent, John K. Rankin.

7. That said Allotting Agent, John K. Rankin, on or about June 26, 1901, received instructions from the Commissioner of Indian Affairs to allot the land on the reservation in accordance with the acts of April 11, 1882 and February 8, 1887. The exact procedure which he was to follow was set out in detail in such instructions and among other things he was to

(1) Allot 160 acres of agricultural and 160 acres of grazing land to the head of a family.

(2) Allot to each married woman 80 acres of agricultural or 160 acres of grazing land.

(3) Allot to all others 80 acres of agricultural and 80 acres of grazing land, and

(4) Each allottee was to receive the same amount of irrigable land. The instructions recited that it was thought 40 acres of irrigable land would be an ample quantity, but Rankin was instructed to confer with the Agent and Superintendent of Irrigation to determine the number of Indians and the number of acres of irrigable land and if there was sufficient irrigable land to give each Indian more than 40 acres, Rankin was to increase the number of irrigable acres given each Indian in his allotment.

Rankin was further instructed that where Indians had made "selections" but had died before

Rankin's allotment, the land in the selection should be allotted, by Rankin, to the heirs of the deceased Indian. (Ex. 17; R. 453.)

8. Rankin allotted the deceased Indians, Heifer Woman, Young Duck, Little Face, Deaf, Medicine Horse, Wolf, and Gives Away, and also Yellow Coyote, #1705, and Mad Bear Wolf, #1704, who were still living at the time of his allotment. All of these had made selections prior to Rankin's allotment and Rankin reallotted them. (Ex. 18; R. 459.)

9. On the Ladow land, under lease to defendant Antler Land Company, The Meat, #1700, and The Back, #1701, had made selections prior to Rankin. Buffalo that Sings, #1702, and Ella Meat, #1703, daughters of The Meat and The Back, were the first allotted by Rankin. (Exs. 18, 49; R. 459, 559.)

10. On each of the allotments mentioned in paragraphs 6, 8, 9, and 14, of this section of our brief, there are approximately 40 acres of irrigable land. All of this irrigable land is under what is designated as the United States Indian Service proposed Upper Little Horn Ditch #1, and are now under and irrigated by the ditch of the defendant Antler Land Company, which is called the Farmers Alliance Ditch. (Ex. 34; R. 495.)

11. All of the allottees described in said para-

graphs 6, 8 and 9 died and their lands were sold by the United States, under the provisions of the Act of May 8, 1906 (34 Stat. L. 182, 3 Kappler 182), and acts amendatory thereto. Patents in fee, without restrictions as to water, were issued to the purchasers. These patentees, by warranty deed with the usual covenants as to hereditaments, appurtenances, etc., conveyed the premises to F. M. Heinrich and he, by similar conveyance, to the defendant Antler Land Company. None of these warranty deeds made any reservation of the water and the Antler Land Company is now the owner of the irrigable lands described in the allotments set forth in paragraphs 6 and 8, supra, and as such owner is possessed of all of the rights of ownership, use and possession which were possessed by the original patentees. (Ex. 28; R. 481.) Mrs. Barney Ladow is likewise the purchaser and owner of the lands covered by the allotments set forth in paragraph 9, supra. (Ex. 30; R. 486.)

12. On November 16, 1905, the plaintiff, by S. G. Reynolds, Superintendent of the Crow Reservation, acting "for and on behalf of the Indians of the Crow Indian Reservation in Montana" filed in the office of the County Recorder of Rosebud County, Montana, that being the county where the said lands were then located, a water right appropriation for 156.25 cu. ft. of water for the irrigation of the lands now owned by Antler Land Company, and Mrs. Barney Ladow.

In the notice of appropriation the described location of the ditch which the Government proposed to construct is practically identical with the location of the Farmers Alliance ditch. (Ex. 33; R. 492.)

Since construction of the ditch was not commenced within three years after the date of the filing of the appropriation, the United States of America through its Indian Agent, Even H. Estep, by authority of the Secretary of the Interior, on July 27, 1914, filed a similar appropriation. (Ex. 45; R. 534.)

These filings are significant because it can be held against the petitioner as an exercise of the right of the Secretary of the Interior to set aside the waters of the Little Big Horn River for use on the lands of these respondents. These filings are also significant because they show that the United States then made no claim to a superior water right for its projects ipso jure as is now the contention of the petitioner.

13. Preliminary surveys of proposed Upper Little Horn Ditch #1 were made by the United States in 1903. (R. 361, 495, 511.) In 1910 work was commenced, by the Government, on Upper Little Horn Ditch #2 and that ditch was completed in 1914. (R. 350.)

The predecessors of Antler Land Company were told by the representatives of the government, in charge of that work, that when Upper Little Horn Ditch #2 was finished that Upper Little Horn Ditch

#1 would be commenced. (R. 499, 513. Offers of proof.) In 1914 when #2 ditch was finished the Government construction crews were withdrawn and that was the first time that predecessors of Antler Land Company knew that Upper Little Horn Ditch #1 was not soon to be constructed by the United States. When this became apparent the predecessors of Antler Land Company started to construct their own ditch. (R. 500.) The Tschirgi (Farmers Alliance) ditch irrigates the same land and has practically the same location of ditch as the Government proposed Upper Little Horn Ditch #1. The actual construction of the Farmers Alliance Ditch was started about August 31, 1915, and was carried on to completion with diligence. (R. 489, 492.)

14. Included under the Farmers Alliance Ditch and watered thereby are the following lands which are still owned by the original Indian allottees, or their heirs, to-wit: Carson Yellowtail, #854; Josiah Thomas Yellowtail, #855; Amy Yellowtail, #856; Whitewoman, #888; Whitebear, #820; Chester Otterchief, #1107; Lucy Yarlott, #1132; Benjamin Hillside, #1179; Yellowbrow, #1310; Whitehip, #1410; Carrie Coverup, #1582; Mrs. David Yarlott, #1693; Grove Stewart, #3549; Sterling Lee Throssel, #3585; and Ralph Emmett Throssel, #3586. (Ex. 29; R. 485.)

Under the Farmers Alliance Ditch there are also the allotments of Joseph Garrett Stewart, #3552;

Henry Keiser, #3513; Juanita Keiser, No. 2, #3314. The last three named allotments are now owned by Antler Land Company. (Ex. 29; R. 485.)

All of the lands of the above allottees, under the Farmers Alliance Ditch, are the same character as to irrigable, agricultural or grazing type, as the lands of the defendant, Antler Land Company, and those of Mrs. Barney Ladow, as may be plainly seen from the map. (Ex. 29; R. 485.)

15. Act of June 25, 1910 (36 Stat. L. 860, 3 Kappler 480), provides for further allotting and contains the so-called "equality clause" which provides that if it appears

> "That lands on any Indian reservation, subject to allotment by authority of law, **have been** or **may be** brought within **any** irrigation project (note it does not say **any Government or any United States Indian Irrigation Service Project**) * * * such irrigable land shall be held to be equal in quantity to twice the number of acres of non-irrigable agricultural land and four times the number of acres of non-agricultural grazing land" (blackface and note in parentheses ours),

and provides that in making future allotments the old allotments shall be reclassified as to unit value, irrigable lands as four units, agricultural lands as two units, and grazing lands as one unit, and after the Indian has received his proportion of irrigable and agricultural lands his unit quota shall be filled by the allotment of grazing land. This is the "1-2-4"

classification used by United States Special Allotting Agent, Charles E. Roblin.

16. June 4, 1920, Congress passed the Crow Act (41 Stat. L. 751, 4 Kappler 271) which among other things provided for the allotment of the surplus land on the Crow Reservation in accordance with the provisions of the act of June 25, 1910 (36 Stat. 860, 3 Kappler 480), as to the "1-2-4" ratio on irrigable lands. This act is the direct authority for the Roblin allotments.

17. In 1921, Special Allotting Agent, Charles E. Roblin, was given instructions by the Secretary and Commissioner to allot all surplus lands on the Crow Reservation, except the unsurveyed area in the Pryor and Big Horn Mountains. He was instructed to make allotments to all Indians living December 4, 1920, and to the heirs of those who had died after December 31, 1905, but he was to make no allotments to Indians who had died prior to December 31, 1905. (Exs. 46, 47, 48; R. 535-558.) Under these instructions Roblin had nothing whatever to do with the allotments or classification of the lands of the allottees described in paragraphs 6, 8 and 9, of this section of our brief, because these allottees were dead before December 31, 1905. Roblin made no classification of these lands but he did classify the lands, described in paragraph 14 of this section of our brief, as IRRIGABLE. (Ex.

51; R. 560.) The Secretary of the Interior on June 7, 1923, approved these allotments and classifications. (Ex. 48; R. 547-558.) **How now can the United States claim that these lands are not irrigable?** If Roblin had had the opportunity it is only reasonable to say that he would have classified all the lands under private ditch as irrigable as he did the three similar tracts shown in Ex. 18; R. 459, and the fifteen tracts, under the Farmers Alliance Ditch, as shown in Ex. 51, R. 560, and the map, Ex. 29, R. 485.

Roblin and the Indian Bureau officials computed the land on the reservation in the value of units; one acre of grazing land was called one unit, one acre of agricultural land was two units and one acre of irrigable land was four units. The total number of units thus arrived at was divided by the total number of Indians entitled to receive allotments (1768); and it was thereby determined that each allottee was entitled to 1040 units. That is, that if the Indian took all grazing land he would receive 1040 acres; if he took all agricultural land he was entitled to 520 acres or if he could get all irrigable land he would receive 260 acres. Since there was not enough irrigable and agricultural lands to go around, and in order that a fair distribution should be made, the allotment was divided among the classes so that he received some of each classification of land, with a total of 1040 units. (Ex. 48; R. 550.)

Roblin re-classified all lands already allotted and charged the Indians with the number of units comprised in his old allotment and then gave him enough surplus land to make up his quota, 1040 units. (Ex. 48.)

18. All of the lands under the Farmers Alliance Ditch which came under the Roblin survey were classified by him as irrigable, including the three Antler owned allotments of Henry Keiser, Juanita Keiser No. 2 and Joseph Garrett Stewart as well as the fifteen Indian owned allotments described in paragraph 14, supra, and each of the eighteen Indians were charged with four units for each acre of land under the Farmers Alliance Ditch. (Exs. 18, 51; R. 459, 560.)

19. On April 26, 1923, Mr. Roblin and Mr. C. H. Asbury, Superintendent of the Crow Indian Reservation, submitted the Roblin allotments to the Indian Office at Washington. On the same day the Indian Office at Washington submitted the allotment schedules of the Roblin allotments to the Secretary of the Interior for approval with recommendation that patents be issued in accordance with the schedules and on June 7, 1923, F. M. Goodwin, Assistant Secretary of the Interior, on behalf of the Secretary of the Interior, approved the Roblin schedules of allotments (Ex. 51; R. 560) and thereafter patents were issued in accordance with the said schedule.

In the schedule of allotments approved there are eighteen pieces of land under the Farmers Alliance Ditch, similar in character to the land of Antler Land Company and Mrs. Ladow, which were classified as irrigable and which the Secretary of the Interior by his approval adjudged as irrigable.

It follows, without further reasoning or argument, that since these lands are irrigable, they must be irrigable by waters from Little Big Horn River and, therefore, the petitioner, having declared them irrigable, cannot now attempt to deny the owner of these lands the water necessary to make them come within the classification it has given them.

20. We contend, then, that as a conclusion of law, the original Indian allottee, if he had lived and still owned the land, would have been entitled to the use of the waters of the Little Big Horn River to irrigate his irrigable land which is under the Farmers Alliance Ditch, in the same manner that the living allottees, described in paragraph 14, supra, are now entitled to the use of said waters.

21. The lands under Upper Little Horn Ditch #1 are irrigable—the petitioner recognizes them as irrigable by the Rankin and Roblin allotments, and—by the proposed construction of Upper Little Horn Ditch #1—not to mention the fact that the respondent has, by use, proved them to be irrigable.

22. Under the **Hibner case,** 27 F. (2d) 912, and **Scheer v. Moody,** 48 F. (2d) 327, 330, the purchaser of Indian allotted lands stands in the shoes of the Indian allottee and has the same rights to the use of the water as his Indian predecessor had.

Edith G. Belken, Judy Walsh and H. G. Campbell lands.

1. All of the grounds urged in behalf of Antler Land Company are available to Edith G. Belken, Judy Walsh and H. G. Campbell with the exception of the dates of filing, date of starting of construction work and that the Belken, Walsh and Campbell lands are under what is described by the petitioner as its proposed Upper Little Horn Ditch #3 instead of #1, and with the further exception that Roblin allotted no lands under Upper Little Horn Ditch #3. This is explained by the fact that all of the allottees under #3 had died before Roblin's allotment, otherwise, it is safe to assume that he would have classified the lands under #3 as irrigable in the same manner as he did the lands under #1.

2. The H. G. Campbell (Mabel Pace) lands are the allotments of Wrinkle Face, #1722, and Medicine Coyote, #1287. These were selections made prior to the Rankin allotment and Rankin re-allotted them. (Ex. 18; R. 459.)

3. The Belken and Walsh lands are the allotments of Crazy Head, #1642, and Pretty Face, #1643. Crazy

Head made a selection prior to Rankin but Pretty Face, who was Crazy Head's wife and not the head of a family, could not make a selection and so her first allotment was under Rankin. There are 77.1 irrigated acres under the Crazy Head allotment and only 3.2 under the Pretty Face allotment. (Ex. 18; R. 459, 534.)

Billie Miller lands.

Billie Miller owns the allotment of Does Anything #1396, upon which there are 111.6 acres of irrigable land and which are now being irrigated. Does Anything made a selection of 160 acres prior to the Rankin allotment. Immediately after the Indian allottee disposed of his title to this land, Billie Miller, the allotte's successor in interest, appropriated and used the waters of Lodge Grass Creek to irrigate these 111.6 acres. Patent in usual form was issued to Billie Miller. (Ex. 39; R. 522.)

Robert J. Miller lands.

Robert J. Miller owns the allotments of Pounded Meat, #1391, Strikes A Feather, #1392, Holds A Feather, #1387, Eagle, #1386, and Plain To See, #493. All of these Indians had made selections prior to Rankin. Plain To See had died before the Rankin allotment and his lands were allotted by Rankin to his heirs. All of the other allottees had died before

the Roblin allotment so he had no chance to classify their lands as irrigable, but it is a certainty that Roblin would have made the same classification of these lands as he did of the lands under the Farmers Alliance Ditch as set forth in paragraph 14, Antler Land Company, and designated them as irrigable. The Robert J. Miller patents have the usual covenants as to appurtenances. (R. 516 to 522; Ex. 2; 325.) Miller has been irrigating 143 acres continuously since 1915. (R. 517.)

Nickels and Mary Dethlefsen lands.

The Dethlefsen land was the original allotment of Rose Martinez, Arthur Peters, Alice Peters and George Peters, members of the Crow Tribe. (Exs. 19, 21, 23, 25; R. 460 to 468.) The husband of Rose Martinez and the father of the other allottees constructed the irrigation ditch for irrigating these lands in 1896 and from 1901 or 1902 these lands were continuously irrigated until they were sold to Dethlefsens. (R. 476, 477.) The Dethlefsens purchased these lands in 1922 and continuously irrigated the same and raised crops ever since. (R. 479.)

Jay L. Henman and Ruth Henman lands.

The Henman lands are in the allotments of Goesahead, #1166, Pretty Shield, #1167, and Crazy Sisterinlaw, #1175. Goesahead and Crazy Sisterinlaw

had made selections prior to Rankin but died before the Rankin allotment. Pretty Shield is the wife of Goesahead and was not entitled to a selection. She was allotted by Rankin and also by Roblin. Roblin had nothing to do with the lands of Goesahead and Crazy Sisterinlaw because they were dead prior to his time, but he did allot Pretty Shield and did not classify any of her lands as irrigable. He thought this land was not irrigable by gravity. But a tunnel has been constructed which makes this land irrigable by gravity, and the land is now being irrigated. It, therefore, comes within the classification which is entitled to water. (R. 525 to 528.)

FOREWORD

Before proceeding further there are two matters which we wish to call to the attention of the Court, which are not properly a part of the argument, but which will enable the Court to better understand our argument:

1. None of the decisions refer to the Indians as a tribe, with the intent to mean a body corporate. In speaking of the Indians the Courts mean the **members** of the Tribe or Nation as a collection of individuals. The word tribe or nation is used as a collective term of associated individuals to distinguish them from other people who may have a different language or characteristics. Chief Justice Marshall in the **Worcester** case (6 Peters 515; 8 L. ed. 483, 500) defines

the word Nation, which we use interchangeably wit
the word Tribe, as "a people distinct from another'
And when in our answer and in this brief we spea
of the rights of the Indians, we have reference to th
individual Indians who collectively make up the trib
or nation. This distinction is plainly set forth in th
case of **Mason v. Sams**, 5 Fed. (2d) 258.

2. In speaking of "the right to the use of water'
"ownership of water," or "water appurtenant to th
land", we are not attempting to define or establish th
legal status of the particular rights which the respo
dents have to the use of the waters of Lodge Gra
Creek and Little Big Horn River. We are not a
tempting to establish the amount of water to whic
petitioner or any of the respondents are entitled. Th
is not an action to adjudicate the water rights in thes
streams. It is an action to entirely restrain the r
spondents from using **any** of the waters of thes
streams, and if the respondents, or any of them, a
entitled to **any** water the petitioners' case must fail a
to them. Therefore, in this action it is not necessar
to determine whether the waters are "appurtenan
to the allotted land" as stated by Judge Bourquin i
the case of **Schee v. Moody**, 48 F. (2d) 332, or tha
we have "the ownership of both the land and water
as stated in the **Hibner** case (27 Fed. (2d) 911), o
whether we have the usufructuary right only. Th
question is: Does the petitioner have the right to e
clude respondents from the use of any water?

Petitioner's Contentions Not In Issue.

Counsel for defendants, Dethlefsen and Yates, asked for an adjudication of the waters and requested that all other appropriators be made defendants in the trial court. But Yates is not in this Court, and the original counsel for Dethlefsen have withdrawn from the case. Their contentions have never been urged by present counsel. That portion of the trial court's findings attempting to adjudicate the waters and granting one-half inch per acre was inserted at the request of original counsel for Dethlefsen, and we have no objection to the action of the Circuit Court of Appeals in striking it out.

This disposes of the third part of petitioner's argument which commences at page 31 of its brief, and we will present no argument relative thereto.

ARGUMENT

I.

WATERS RESERVED FOR INDIVIDUAL INDIANS.

The theory of the Government in the trial court and in the Circuit Court of Appeals was that the United States is the owner of the waters of the streams of the Crow Indian Reservation.

The Government has abandoned that contention and now agrees with the position respondents have taken from the beginning, i.e.—**the waters were reserved, by**

the Treaty of May 7, 1868, for the Indians (Petitioner's brief 17), but petitioner claims that the reservation was for the tribe, as a whole, and not for the use of the individual Indians who were given the lands. This is the first legal question presented by this appeal.

JUDICIAL INTERPRETATION.

This Court, in **Winters v. United States**, 207 U. S. 564, in establishing the law that the "Indians" reserved the waters, at page 576 of the opinion, says:-

> "The reservation was a part of a very much larger tract which the Indians had the right to occupy and use, and which was adequate for the habits and wants of a nomadic and uncivilized people. It was the policy of the government, it was the desire of the Indians, to change those habits and to become a pastoral and civilized people. If they should become such, the original tract was too extensive; but a smaller tract would be inadequate without a change of conditions. The lands were arid, and, without irrigation, were practically valueless."
>
> **Winters vs. United States, 207 U. S. 564.**

And the opinion of the Circuit Court in the decision appealed from reads, in part:-

> "We are of the opinion that it was the intention of the treaty to reserve sufficient waters of Milk River, as was said by the Court below 'to insure to the Indians the means wherewith to irrigate their farms', and that it was so understood by the respective parties to the treaty at the time it was signed." **Winters v. U. S., 143 Fed. 743. 746.**

It must be noted that in these opinions 'Indians" and not "tribe of Indians" are mentioned. Nowhere is

it stated that the "tribe" retained the right to use the waters of Milk River.

The Circuit Court of Appeals for the Ninth Circuit, in the case of **U. S. v. Conrad Investment Company, 156 Fed. 123,** at page 127, says:-

> "The government has the legal title, and, while it may be said to hold the lands in trust for the **Indians who are in the occupancy thereof for** permanent homes (Act, Congress May 1, 1888, c. 213, 25 Stat. 113), yet it is their guardian and protector, and is bound by the policy it has adopted and long maintained towards them to conserve their rights and interests until released from guardianship; it being designed that eventually its release shall come through allotments in severalty in pursuance of the general allotment act of February 8, 1887 (24 Stat. 388, c. 119.)"

And at page 129:

> "* * * The lands being arid, the need of water is manifest, and so it must be considered that it was likewise designed that the Indians should have and enjoy the use of water in available streams wherever their needs might require. * * * And Major Dare, the agent in charge, tells us that about 90 percent of the Indians on the reservation have taken up separate settlements. This denoted progress in the way of the government's policy, and gives promise that its full hopes may yet be realized. Manifestly, the Indians cannot be expected to acquire water rights to any considerable extent through prior appropriation, because they are not far enough advanced in the art of agriculture to reduce the water to a continuous use, and the water of the public streams that they shall finally need depends largely upon their progress in this art. The government, how-

> ever, being their guardian, has a most important trust to perform in this relation; that is, so to conserve the waters of such **streams as traverse or border the reserve as to supply the Indians fully in their probable, or, I might say, even possible future needs,** when they have ultimately secured their allotments in severalty." (Boldface ours.)

In the entire opinion no reference is made to the right of the Indians as a "tribe" to any water on the reservation.

In **Conrad Inv. Co. v. U. S., 161 Fed. 829, 831,** the Court in commenting upon its decision in the **Winters** case said:

> "that the United States, by treaties with the Indians on the reservation, had impliedly reserved the waters of Milk river for the **benefit of the Indians** on the reservation to the extent reasonably necessary to **enable them to irrigate their lands,** and that the 'settlers on public lands outside of the reservation could not acquire * * * the right to divert the waters of Milk river to the prejudice of the **rights of the Indians residing upon that reservation'.**" (Boldface ours.)

No reference was made to the rights of the Indians **as a tribe.**

U. S. v. Wightman, 230 Fed. 277. Action was brought "by direction of the Attorney General * * * in behalf of the **United States and the Indians residing upon the San Carlos Indian Reservation in Arizona.**" No mention was made of the **tribe.** (p. 278.)

In **Skeem v. United States,** 273 Fed. 93, no mention is made of any rights of the tribe. Only rights of individual Indians were considered.

The same is true of **U. S. v. Parkins,** 18 Fed. (2d) 62; **U. S. v. Hibner,** 27 Fed. (2d) 909 and **Scheer v. Moody,** 48 Fed. (2d) 327.

INTENTION OF THE GOVERNMENT.

The **Winters case** holds that the waters were reserved for use on the arid lands of the reservation so that the Indians could make their living as an agricultural and pastoral people; and that without irrigation these lands were valueless.

It was not contemplated that the agricultural and pastoral pursuits should be carried on as a tribe, OR THAT THERE SHOULD BE ANY COMMUNISTIC FARMING. On the contrary, the treaties provide that the lands should be allotted in SEVERALTY.

Prior to the enactment of the allotment acts, the Indians held tribal land in common. No individual Indian had a right to any particular property, and hence he had no right to any particular quantity of water. He had no right to alienate any proprety because he had no ownership in severalty; and when he died, his rights in the lands, the waters, and the occupancy and use of both ceased, for the reason that no member held title to a particular described piece of land.

Article 6 of the Treaty of May 7, 1868 says:-

> "ARTICLE 6. If any individual belonging to said tribes of Indians, or legally incorporated with them, being the head of a family, shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, a tract of land within said reservation, not exceeding three hundred and twenty acres in extent, which tract, when so selected, certified, and recorded in the 'land book,' as herein directed, **shall cease to be held in common,** but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it. (Boldface ours.)
>
> **15 Stat. 649, 2 Kappler 1008, 1011.**

In conformity with the provisions of the Treaty of May 7, 1868, Congress on April 11, 1882, ratified an agreement with the Crows wherein its was agreed:-

> "First. That the Goverment of the United States cause the agricultural lands remaining in our reservation to be properly surveyed and divided among us in severalty, in the proportions hereinafter mentioned, and to issue patents to us respectively therefor, so soon as the necessary laws are passed by Congress. **Allotments in severalty of said surveyed lands shall be made as follows:** * * * " (Boldface ours.)
>
> **22 Stat. 42, 1 Kappler 195.**

and again in the same Act, at page 196:-

> "SEC. 2. That the Secretary of the Interior be, and he is hereby, authorized to cause to be surveyed a sufficient quantity of land on the Crow Reservation to secure the settlement in **severalty** of said Indians as provided in said agreement, and upon the completion of said survey he shall cause allotments of land to be made to each and all of

the Indians of said Crow tribe in quantity and character as mentioned and set forth in the agreement above named, and upon the approval of said allotments by the Secretary of the Interior he shall cause patents to issue to each and every allottee for the lands so allotted, with the same considerations, restrictions, and limitations mentioned therein as are provided in said agreement." (Boldface ours.)

22 Stat. 42. 1 Kappler 196.

The General Allotting Act of February 8, 1887 (24 Stat. 388), provided for the allotting of the lands of the reservation among the Indians **in severalty** and the same Act provided that where the use of water for irrigation is necessary to render the lands within any Indian Reservation available for agricultural purposes the Secretary of the Interior is authorized to prescribe rules and regulations to secure a **just** and equal distribution of water among the Indians residing on said reservation.

"SEC 7. That in cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the **Secretary of the Interior be, and he is hereby, authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservation.**" (Boldface ours.)

24 Stat. 388, 1 Kappler 35.

Certainly a distribution to the individual Indian and not to the tribe. HOW COULD A DISTRIBUTION BE MADE TO THE TRIBE AS A WHOLE

—IF THERE WAS TO BE A DISTRIBUTION
WOULD HAVE TO BE MADE TO INDIVIDUA

In negotiating the treaty, the Government reques
and the Indians agreed, to give up a life of hunti
and fishing, wherein a large undivided tract w
necessary, and to accept a smaller reservation whe
in they were to change their mode of living to th
of an agricultural and pastoral people. The **Wint**
case holds that even though water was not mentio
in the treaty, there was an implied agreement, th
the water, necessary to permit the Indians to ad
the new mode of life, was reserved in them.
other construction of the treaty could be possible.

Carry the doctrine of the **Winters case** one st
further. By the treaties, the land and the water w
reserved to the Indians with the promise that t
Indian could make a selection of the land he desi
to farm as an individual, and the Government pro
ised to cause the agricultural lands to be prope
surveyed, divided among the Indians in severalty, a
to issue patents therefor.

The survey was made, the allotments entered a
patents issued. The Indian was given his share
the land so that he might farm for himself, beco
an individualist, and adopt an agricultural and p
toral life.

If it was the intention of the treaty to reserve t
water so that the Indians could make a living as far

ers, then, when the Indian was given his own individual land,—how could he be expected to make his living on "this barren waste" without the water to permit him to lead this pastoral and agricultural existence. Certainly he was given the water with the land.

It was the policy of the Government that when the Indians received their allotments, that they should become irrigation farmers. The Government's own records, introduced by petitioner, outlines this policy. H. J. Armstrong, Indian Agent at Crow, in his report to the Commissioner of Indian Affairs, dated November 22, 1884, sets forth the policy of the Government regarding irrigation on the Crow Reservation, and we quote therefrom:-

> "Above Soap Creek for a distance of about 10 miles there is some fine farming land but the banks of the Big Horn are lower as we approach the canyon, and the small farms already located there as well as others which will be located there during the next two or three years can be irrigated without much difficulty by the Indians themselves (with one or two white men to show them how to take the water out) directly from the Big Horn River." (R. 328.)

Certainly it was the intention that individual ditches should be taken directly from the river; and in the same report:-

> "The ditches 1 and 2 are supposed to include all the ditching necessary on the Little Big Horn River from the Grass Lodge Creek down to this agency—a distance of 28 miles. I do not mean

to say that these two ditches will cover all the farming land in this valley inside the 28 miles, but they include all the ditching that is practicable; and with a few irrigating wheels (wheels which by their own motion lift the water from the bed of the stream and pour it out on top of its banks) which we can build ourselves at an expense of about $25.00 each, will irrigate the whole of the 28 miles." (R. 328.)

It was intended that the lands not covered by the two project ditches could be irrigated by putting in "irrigating wheels"; and again:-

> "Above the mouth of the Grass Lodge Creek (on the Little Horn river) there is a great deal of fine farming land; but there are no wide valleys and there appears to be considerable more moisture as we approach the mountain range; furthermore, but few Crows are locating so high up in the valley, **so that the plan for irrigating that region need not be considered at present.**" (Boldface ours.) (R. 329.)

Here we find plans for irrigating the upper Lodge Grass lands, which are now owned by respondents, R. J. Miller, Billie Miller, and the Dethlefsens.

The same Indian Agent, on September 20, 1885, in his report to the Commissioner of Indian Affairs, says:-

> "This brings our report down to the subject of farming, which may be considered the most important work we have had before us. With white people it would be second to the stock business, but with Indians it is of the first importance, for the sole reason that it teaches them to have a **settled residence,** which is the starting point in the work of civilizing them." (R. 334.)

The policy of the Government was to make farmers out of the Indians. They were to have their own lands, and to farm their own lands they must have the water for these individual allotments.

RIGHTS GRANTED BY ALLOTMENTS AND PATENTS.

Counsel argues that since the allotment acts make no mention of water that the allotment carries with it no right to the use of water. They forget the decision of this Court in the **Winters case** which holds, that when water is necessary to carry out the intention of the parties, that water is reserved for the purpose contemplated. If there was an implied reservation of water in the treaty, the same construction applies to the allotment acts. Counsel cites the case of **British - American Co. v. Board,** 229 U. S. 159, 81 L. ed. 95, as authority for its contention that Congress could allot the lands in severalty and still retain the water. The case cited is not applicable. That case deals with the mineral rights, and the trust patents contained a reservation of all minerals for the benefit of the tribe. Certainly, when that reservation was made in the patent, the patentee could not expect to receive the minerals. Our case, is entirely different. But the case of **British-American Co. v. Board** upholds our contention to the effect that those things which are needed for farming and agriculture are a part of the estate granted:-

> "Obviously the mineral deposits which are the subject of the lease are not needed for farming or agricultural purposes and are not desired for individual allotments.
> The issue of the trust patents containing, as the statute requires, a reservation for the benefit of the tribe of all minerals, including oil and gas, in or under the allotted land, operates to carve out of such land and create a distinct estate consisting of the minerals. This estate is in itself land, and, being reserved for the benefit of the tribe, it is tribal land, and is unallotted."
> **British - American Oil Production Co. v. Board**, 299 U. S. 159, 81 L. ed. 95.

This is a case which comes from Montana.

FALLACY OF PART I OF PETITIONER'S ARGUMENT.

Petitioner argues that the water belonged to the tribe, in common, and that, when the Indian was granted his individual allotment, the water, instead of going to the Indian with his land, was retained by the tribe. Follow this argument to its logical conclusion and we find this situation: All the lands of the reservation have been allotted to individual Indians; no tribal lands remain; the individual Indians have no water for their lands; the tribe, as a whole, has all the water and no land upon which the water can be used. The petitioner's reasoning leads us to an absurd conclusion and absolutely destroys Part I of the petitioner's argument.

II.

WATER BECAME APPURTENANT ON ALLOTMENT.

The right to the water was retained by the Indians in the Treaty of May 7, 1868. The water was for use on the lands of the reservation to make it an agricultural and pastoral country, **Winters case**, not for use in mining as suggested by counsel.

When the land was allotted to the individual Indian. the water, following the intention of the treaty as construed by the Winters case, went with the land to the individual Indian.

When the patent was issued, it simply gave legal form to the rights which were granted in the treaty and confirmed by the allotments and the subsequent action of the Government. We do not contend that the patents, themselves, granted any rights not theretofore existing. The water became appurtenant to the land when the Indian received his allotment. It is significant that the patents make no attempt to reserve the water, although they do reserve other rights which the United States intended to retain. The Government patents for these lands convey the same "together with all the rights, privileges, immunities and appurtenances, of whatsoever nature, thereunto belonging". (R. 460) In the patents there is a reservation for right-of-way for canals, constructed by the authority of the Government, but no specific reservation of water rights. In the deeds of conveyance,

from the patentees to these defendants, no reservation of water was made. (R. 462) The rights which were appurtenant to the land were conveyed by both the patent and the later deeds of conveyance. **Kelsey v. Bray,** 69 Mont. 78, 220 Pac. 532; **McDonald v. Lannen,** 19 Mont. 78, 47 Pac. 648; **Sloan v. Glancy,** 19 Mont. 70, and **Sweetland v. Olson,** 11 Mont. 27, 27 Pac. 339, as well as the cases cited by petitioner at page 25 of its brief. These respondents have all the rights of the original patentees.

VESTED RIGHTS.

Much has been said about the plenary powers of Congress, but Congress has no power to arbitrarily abrogate the right which has been actually conferred; Congress has no power to alter, cancel or destroy vested rights.

Once these rights have been conferred upon the Indian, neither the Secretary of the Interior, the Commissioner of Indian Affairs nor Congress can abrogate or take them away.

> "It is conceded that no right which was actually conferred on the Indians can be arbitrarily abrogated by Statute."
>
> **Choate v. Trapp,** 224 U. S. 665, 674.

> "There is a broad distinction between power to abrogate a statute and to destroy rights under it; and, while Congress under its plenary power over Indian tribes can amend or appeal an agreement by a later statute, it cannot destroy actually

existing individual rights of property acquired under a former statute or agreement." (Syllabus 1.)

"Indians are not excepted from the protection guaranteed by the Federal Constitution, but their rights are secured and enforced to the same extent as those of other residents or citizens of the United States." (Syllabus 10.)

Choate v. Trapp, 224 U. S. 665.

In the case of **Morrow v. U. S.,** 243 Fed. 854, 856, the Circuit Court of Appeals for the 8th Circuit says:

"There is no question that the Government may, in its dealings with the Indians, create property rights, which, once vested, even it cannot alter. **Williams v. Johnson,** 239 U. S. 414, 420, 60 L. Ed. 358; **Sisemore v. Brady,** 235 U. S. 441, 449, 59 L. Ed. 308; **Choate v. Trapp,** 224 U. S. 665, 56 L. Ed. 941; **English v. Richardson,** 224 U. S. 680, 56 L. Ed. 949; **Jones v. Meehan,** 175 U. S. 1, 44 L. Ed. 49; **Chase v. U. S.,** 222 Fed. 593, 596. Such property rights may result from agreements between the Government and the Indian. Whether the transaction takes the form of a treaty or of a statute is immaterial; the important considerations are that there should be the essentials of a binding agreement between the Government and the Indian and the resultant vested property rights in the Indian." (Boldface ours.)

The **Morrow** case was on the question of exemption of trust allotments from State taxation, and the Court, speaking more directly at that point, says at page 856:

"That exemption of land from taxation is a property right, is established. **Choate v. Trapp,** supra. That this Indian had taken possession of and was enjoying this land under such an ex-

> emption at the time the Clapp Amendment was passed is undisputed. Therefore, if this exemption came to him as a legal right, it had fully vested. It came as such legal right if it rested on the solid basis of a **binding agreement.**" (Boldface ours.)

The right of the Indian to the use of the water would seem, in the language of the Circuit Court of Appeals, to be a vested legal right, because it **rested on the solid basis of a binding agreement which has been fully executed.** This agreement was the agreement of the Government with the Indian as expressed in the Treaty of May 7, 1868, as interpreted by the **Winters** case, wherein the Government agreed, in consideration of the relinquishing of the remainder of the territory, to allot, in severalty, the remaining lands on the reservation to the individual members of the tribe.

Circuit Judge Sanborn, on the same subject of vested rights of an Indian, says:

> "If by the treaty of 1865 a substantial right in or title to the land in question was granted to or vested in Clarissa Chase and her heirs, the subsequent act of Congress of 1882 was ineffective to impair or destroy that right or title because: First, Indians as well as other residents and citizens of the United States are protected by the fifth amendment to the Constitution against deprivation of property, life, or liberty without due process of law. No act of Congress or legislative fiat constitutes due process of law, whereby a vested right in or title to property may be either seriously impaired or destroyed. **Choate v. Trapp,**

224 U. S. 665, 670, 677, 32 Sup. Co. 565, 56 L. Ed. 941; **Jones v. Meehan,** 175 U. S. 1, 20 Sup. Ct. 1, 44 L. Ed. 49; **In re Heff,** 197 U. S. 488, 504, 25 Sup. Ct. 506, 49 L. Ed. 848; **Cherokee Nation v. Hitchcock,** 187 U. S. 294, 307, 23 Sup. Ct. 115, 47 L. Ed. 183; **Jackson v. Goodell,** 20 Johns. (N.Y.) 188; **Lowry v. Weaver,** 4 McLean 82, Fed. Cas. No. 8, 584; **Whirlwind v. Vonder Ahe,** 67 Mo. App. 628; **Taylor v. Drew,** 21 Ark. 485, 487." (Boldface ours.)

Chase v. U. S., 222 F. 593, 596; reversed by **U. S. v. Chase,** 245 U. S. 89, 62 L. Ed. 89.

"It is conceded that no right which was actually conferred on the Indians can be arbitrarily abrogated by Statute."

Choate v. Trapp, 224 U. S. 665, 674, 56 L. Ed. 941.

The U. S. District Court of Montana in the case of **United States v. Heinrich,** 12 F. (2d) 938, 939, in a case where many of the same questions were involved, held:

"Such patents as were issued here would, without doubt, include the water and ditch rights appurtenant to the land, although not expressly mentioned therein. **Brewer-Elliott Oil & Gas Co. v. United States,** 260 U. S. 77, 43 S. Ct. 60, 67 L. Ed. 140; **Hardin v. Jordan,** 140 U. S. 371, 11 S. Ct. 808, 838, 35 L. Ed. 428; **Packer v. Bird,** 137 U. S. 661, 11 S. Ct. 210, 34 L. Ed. 819; **Smith v. Denniff,** 23 Mont. 65, 57 P. 557, 50 L. R. A. 737; **Tucker v. Jones,** 8 Mont. 225, 19 P. 571; **McDonnell v. Huffine,** 44 Mont. 411, 120 P. 792.

Rights are said to be vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest. **Pearsall v. Ry. Co.,** 161 U. S.

646, 675, 16 S. Ct. 705, 40 L. Ed. 838. 'A vested right is an immediate right of present enjoyment, or a present, fixed right of future enjoyment.' 4 Kent, Comm. 202.

An Indian's 'right of private property is not subject to impairment by legislative action, even while he is, as a member of a tribe, subject to the guardianship of the United States as to his political and personal status.' **Choate v. Trapp**, 224 U. S. 665, 32 S. Ct. 565, 56 L. Ed. 941.

Titles confirmed many years before by the authorized agents of the government may not be nullified, and rights created by carrying a statute into effect cannot be devested or impaired. **Gritts v. Fischer**, 224 U. S. 640, 32 S. Ct. 580, 56 L. Ed. 928; **Reichert v. Felps**, 6 Wall. 160, 18 L. Ed. 849; **Sizemore v. Brady**, 235 U. S. 441, 35 S. Ct. 135, 59 L. Ed. 308; **U. S. v. Rowell**, 243 U. S. 464, 37 S. Ct. 425, 61 L. Ed. 848. Otherwise, where nothing had been done by officers of the government under prior act, and matter remained executory, and no vested right had attached at the time of approval of later act. **U. S. v. Stocksiager**, 129 U. S. 470, 9 S. Ct. 382, 32 L. Ed. 785. No act of Congress or legislative fiat constitutes due process of law, whereby a vested right in or title to property may be either seriously impaired or destroyed. **Chase v. United States**, 222 F. 593, 138 C. C. A. 117." (Italics ours.)

United States v. Heinrich, 12 F. (2d) 938.

RIGHTS OF PURCHASER OF INDIAN LANDS AND WATERS.

Rights of Purchaser.

The Indian allottee has a right to the use of sufficient water to irrigate his irrigable land. That right is appurtenant to the land. Upon allotment the In-

dian became vested with all the rights incident to ownership of both the lands and the water under the treaties, with a priority of May 7, 1868. When the United States sold the dead Indians' land, it sold all of the Indians' interest in the land, which included the water. The purchaser of the land, either from the Indian, or his guardian, the United States Government, secured all the right of the Indian in and to the land and the water. A very lucid and a correct statement of the law is found in **United States v. Hibner**, 27 F. (2d) 909, 912, as follows:

> "This question is not free of difficulty, for it presents for consideration what is the status of the water rights of those who have acquired by purchase their lands from the Indians whose rights were reserved unto them, and who became vested with all the rights incident to ownership of both the lands and water under the treaties, with a priority of February 16, 1869. **The right of the Indians to occupy, use, and sell both their lands and water is now recognized, as this view is sustained in the case of Skeem v. U. S., supra, and, such being the case, a purchaser of such land and water right acquires, as under other sales, the title and rights held by the Indians, and that there should be awarded to such purchaser the same character of water right with equal priority as those of the Indians.**" (Boldface ours.)
>
> **United States v. Hibner**, 27 F. (2d) 912.

The Circuit Court of Appeals for the Ninth District, in deciding upon a Montana case, held that the water rights became appurtenant to the Indians' allotments and could be sold with the land:-

"That these ditches and water rights are priva property is clear. The ditches were built by a for Indians and for the lands in suit, and the wat by these ditches conveyed was upon these lan used. Thus appropriated, ditches and wat rights became appurtenant to the Indians' lotments, and like the allotments themselves, th property in severalty. And as such, they cou as they did convey them to plaintiffs."

Scheer v. Moody, 48 F. (2d) 327, 330.

The trial court and the lower court were right their findings that the Indian allottees had a vest right in the water and that the purchaser of the lands, either from the Indian himself, or from t Government as the Indian's guardian, steps into t shoes of the Indian.

III.

RECORD MISQUOTED.

It is very evident that counsel for petitioner, wh took no part in the trial of the case or in the arg ment in the lower court, are not familiar with t facts in the case or the record, and this may accou for the misapplication of the law. Counsel seem be under the impression that there are 63,000 acr of irrigable land under the irrigation projects a fected by this case. There are but 20,636.88 acres these projects which are considered irrigable by t Government. (R. 353, 357.) There are but six uni involved here, i.e. Agency, Lodge Grass No. 1, For Mile, Reno, Upper Little Horn No. 2, and Lodge Gra

No. 3. Bozeman Trail Ditch is not a government project as we will point out later in this brief.

At page 4 of its brief petitioner states that the project was constructed and maintained for the benefit of the Indian tribe. That is an error. In 1934 only 731 acres of Indian land were irrigated. (R. 404.)

Petitioner states at page 23 of its brief, that only three 40-acre tracts of the entire acreage to be allotted (by Roblin) were classified as irrigable, and these were so classified subsequent to their allotment. The three mentioned were classified prior to their allotment as these Indians had had no allotments under Rankin. Petitioner is talking about the Roblin allotments, and the above statement in the brief is incorrect. Roblin allotted to living Indians only. He allotted lands to eighteen Indians whose lands were under the Farmers Alliance Ditch. The three mentioned had sold their land to Antler Land Company, but the other fifteen still owned their allotments. (Ex. 29, 30; R. 485, 487) These lands are the same character as to irrigable, agricultural or grazing type, as the lands of respondent, Antler Land Company. (Ex. 29; R. 485.)

All the lands lying under the Farmers Alliance Ditch which had belonged to these eighteen were classified by Roblin as irrigable. (Ex. 48; R. 547-558.)

IV.

SECRETARY OF INTERIOR HAS NO DISCRETIONARY OR ARBITRARY POWER TO MAKE A DIVISION OF THE WATERS.

Petitioner in "b" of the second part of its argument contends "the control of the use of waters of the Indian reservation has been placed in the Secretary of the Interior." We strenuously dispute this contention.

Petitioner claims this authority is contained in Section 7 of the Allotment Act of February 8, 1887. This section is set forth at page 33 of this brief.

The plain intention of this section is to authorize the Secretary to prescribe "rules and regulations," —for what—**to secure a just and equal distribution** ···, to whom—**among the Indians residing upon the reservation.** His discretion is as to the rules and regulations, not as to the distribution. He could make rules as to how the water should be taken out of the stream and to see that the proper amount of irrigated land was given to each Indian residing on the reservation. but this act does not, or could not, give to the Secretary the right to give water to one piece of land and deny it to another. When the Secretary of the Interior attempts so to do, his actions are without authority and an unlawful and illegal usurpation of power.

A similar question was decided by the Federal

Courts in the case of **Mason v. Sams,** 5 F. (2d) 255: The treaty of 1855 with the Quinaielt Indians provided that the retained portion of the reservation was "reserved for the use and occupation of the bands and tribes aforesaid * * * ." The Secretary of the Interior made an order granting to certain members of the tribe the exclusive right to take fish on certain locations on the Quinaielt River which runs through the diminished reservation. The licensees were to pay a royalty on the fish taken which was to go to the common tribal fund.

In justifying the granting of exclusive fishing rights to a few, to the exclusion of others, the Secretary said:

> "In the interest of the tribe to whom fishing rights on the Quinaielt Reservation belongs, and for the reason that only a comparatively small number of Indians can be assigned fishing locations, the following percentage of the fishing receipts shall be collected and placed to the credit of the tribe as a royalty * * *."
>
> **Mason v. Sams,** 5 F. (2d) 255, 256.

But the Court ruled that the Secretary exceed his authority.

> "It is plain that there are only a comparatively small number of fishing locations upon the river within the reservation, and that, broadly speaking, the fishing rights upon the river belong to the tribe; but there can be fishing in the river without granting exclusive rights to defined locations.
>
> It does not follow, from the described condi-

> tions, that the individual Indian who wants to fish in that stream can be denied in order that, to his exclusion, fishing may be carried on for commercial purposes, in part, for the benefit of Indians of the tribe who do not care or who are not able to fish. The treaty was with the tribe; but the right of taking fish at all places within the reservation, and usual and accustomed grounds and stations outside the reservation, was plainly a right common to the members of the tribe—a right to a common is the right of an individual of the community." **Mason v. Sams,** 5 F. (2d) 258.

The syllabus in the last mentioned case reads as follows:

> "Under Treaty of 1855 with Quinaielt or Taholah Indians, the right to fish is common to all members of the tribe, and the Secretary of the Interior or Commissioner of Indian Affairs is without authority to make regulations under which particular locations on Quinaielt river are assigned to individual members with exclusive rights therein, and requiring them to pay royalty on fish sold for the benefit of other members of the tribe."

The attempt of the Secretary and Commissioner to make regulations granting to certain members of the Crow Tribe the right to use the waters of the Little Big Horn River to the exclusion of other members of the tribe is a similar unlawful usurpation of power.

The District Court of Montana has also passed upon this discretion of the Secretary and very aptly in a water litigation case in Montana, where the question of the rights of private ditches on the Flathead Res-

ervation is discussed and Judge Bourquin uses these words:

> "Immaterial is it also whether or not the allottees' appropriation of the waters was pursuant to rules by the Secretary prescribed as authorized by the Act of 1887 aforesaid. The statute vests discretion in the Secretary, is not mandatory, and is intended to restrict the recognized right of appropriations only so far as in the judgment of the Secretary its exercise in absence of controlling rules would work injustice. Rules or not, the Indians' necessities were as great, their right to appropriate water no less, save to the extent exercised inequitably. And as before noted, the Indians' appropriations of water were known to, sanctioned by, and acquiesced in by the Secretary, more effective than any of his rules and for which he perceived no necessity."

Scheer v. Moody, 48 F. (2d) 331.

DID THE SECRETARY EVER EXERCISE RIGHT TO DISTRIBUTE WATER?

The Secretary not only does not have the power or authority to devote these waters to the exclusive use of the Government projects, but he has never made any attempt to do so.

> "It is not alone a question of the **power** of the United States to devote these waters to the exclusive use of the Indians, but it is a question of whether it has **exercised the power.**"

U. S. v. Wightman, 230 F. 277, 283.

The Crow Tribe authorized the use of tribal funds in the construction of irrigating systems on Crow Indian Reservation, and they authorized the Secretary

of the Interior to spend that money. The authorization of the use of tribal funds to help build Government projects did not mean that there was to be one irrigation project. Appellant's own exhibit, report of H. J. Armstrong, Indian Agent at Crow (Ex. 3, R. 327, 328) says that in addition to the Government ditches the Indians themselves can take out private ditches. A part of this report states:

> "The small farms already located there as well as others which will be located there during the next two or three years can be irrigated without much difficulty by the Indians themselves (with one or two white men to show them how to take the water out) directly from the Big Horn River."

It is very evident that the Government then did not intend to make the Government project ditches the exclusive way of using the water of the reservation.

THE ACT OF MARCH 3, 1891 (26 STAT. 1040, 1 KAPPLER 433)

Evidently realizing the insecurity of reliance upon the Act of February 8, 1887, the petitioner says (p. 28 of its brief) that IF Section 7 of the Act of 1887 did not place control of all waters of the reservation in the Secretary of the Interior, the Act of March 3, 1891, has set aside and reserved the waters of the reservation for the lands under the Government irrigation system and that no waters could be used on allotted lands which were not under this system. The 1891 Act simply authorized the use of tribal money

to build dams, canals, ditches and laterals on the reservation. It made no attempt to grant water rights to any lands. Petitioner confuses a "water right" with "ditch rights." The 1891 Act and subsequent appropriation acts simply provided tribal and treasury money for constructing ditches. We have discussed this question at page 9 of this brief.

The intention of the Government when it advanced treasury and tribal money for the construction of these ditches was simply to make a loan for the building of the ditch as is evidenced by the Act of May 26, 1926 (44 Stat. 653-661, 4 Kappler 552), which amended the Act of June 4, 1920. (41 Stat. 751, 4 Kappler 271.) The 1926 Act declared that tribal moneys expended in the construction of the Crow Irrigation systems were reimbursible, and an attempt was made to collect the same from the land irrigated. The case of **U. S. vs. Heinrich,** 12 F. (2) 938, supra, grew out of the attempt of the United States to collect these moneys from the purchaser of the land.

Congress, when it took the tribal money belonging to all the Indians, to build ditches for a few Indians did a great injustice to those Indians whose irrigable lands were not under the Government system. To now attempt to deprive these Indians of the right to water is the height of injustice.

V.

THE EQUITIES.

This is not an action to protect the Indians.

In 1934 the total acreage actually irrigated by the Crow Irrigation Project systems in the Little Big Horn and Lodge Grass area was 7,419 acres, of which 4,619 acres were Indian owned, and 2,800 acres white owned. (R. 400.) Of the Indian owned land, only 567 acres were irrigated by the Indians themselves, (R. 405) the remainder of the Indian owned land being farmed by white men who are lessees of Indian land. Thse figures do not include Bozeman Trail Ditch where the total acreage susceptible to irrigation is 1,881.49 acres (R. 400), and the number of acres of Indian owned land actually irrigated under that ditch in 1934 was 990 acres. (R. 401.) Only 20 acres of these Indian owned lands were actually irrigated by Indians. (R. 405.)

If the water was to be reserved for the Indians themselves and not their assignees, we find that there are only 587 acres entitled to water. The petitioner is attempting to deliver water to white lessees of Indian lands and to deny it to white owners of Indian land. This is really an action to protect one group of white men against another group of white men.

BOZEMAN TRAIL DITCH.

The Bozeman Trail Ditch is a privately owned company covering 2819.39 irrigable acres. (R. 351.) In

1922 the United States of America, through the Secretary of the Interior, entered into a contract granting to said private company the right to divert from the Little Big Horn River water to irrigate 2819.39 acres of land. (R. 373, 375.)

The Bozeman Trail Ditch Company contract was made July 24, 1922. (Ex. 13, R. 373.) It recites that the company has constructed the canal; evidently it had been constructed before the contract was entered into, and it is equally evident, without any prior consent of the government, as the record fails to show any such consent before the canal was constructed. **Under the contract a right-of-way is granted the company for its canal, and the company sells water rights to the Government for Indians having land under the canal. The company sold, assigned and conveyed absolute water rights in its canal for the irrigation of 1961.34 acres of allotted Indian lands.** (R. 375.)

Evidently the Government at that time was not acting upon the theory that all water rights were reserved for the Indians and the Government irrigation projects. We find numerous acts of Congress which show that Congress considers that neither the United States nor the Secretary of the Interior has any right to water on Indian Reservations except through purchase.

Chapter 994, 32 Stat. 997, appropriated $150,000 for the "Purchase of water rights on Indian Reser-

vations in the discretion of the Secretary of the Interior, and subject to his control, and for other purposes." $125,000 was appropriated for purchase of water rights on Indian reservations and for other purposes, by Act of March 1, 1907. (34 Stat. 1017.) A similar appropriation of $200,000 was made March 3, 1909. (35 Stat. 782.) Likewise appropriations of $314,000 (36 Stat. 1059); $325,000 (37 Stat. 518); $335,000 (38 Stat. 78, and 582); $235,000 (39 Stat. 124 and 929), and other appropriations for the same purpose. (43 Stat. 400 and 1150; 44 Stat. 943; 47 Stat. 21.)

35 Stat. 812 reads as follows:

> "To enable the Commissioner of Indian Affairs to perfect and protect the rights of the Uncompahgre, Uintah, and White River Utes in Utah in and to the waters appropriated under the laws of the State of Utah for the irrigation systems authorized by the Act of June twenty-first, nineteen hundred and six, two hundred thousand dollars, or so much thereof as may be necessary, the amount expended hereunder to be reimbursed from the proceeds of the sale of lands within the former Uintah Reservation: Provided, that said sum, or any part thereof, shall be used only in the event of failure to procure from the State of Utah or its officers an extension of time in which to make final proof for waters appropriated for the benefit of the Indians, and any sum expended hereunder shall be reimbursed from the proceeds of the sale of the lands within the former Uintah Reservation."

and again:

> "That the Secretary of the Interior is hereby

authorized to expend from the funds of the Southern Ute Indians in the Treasury of the United States sufficient moneys, not exceeding one hundred and fifty thousand dollars, to purchase a perpetual water right for the purpose of irrigating not less than ten thousand acres of land in the Southern Ute Indian Reservation in Colorado." (35 Stat. 788.)

By act of June 10, 1922 (42 Stat. 625), an appropriation of $24,000.00 was made for the purpose of purchasing water rights for Indians in Two Leggins Canal for the irrigation of allotted lands of the Crow Indians.

Under Article 2 of the Crow Treaty of August 14, 1899 (33 Stat. 352, 3 Kappler 88), $10,000.00 was to be spent in the building, extension and completion of individual Indian ditches.

Under the Bozeman Trail Ditch contract the Secretary of the Interior and the United States granted water from the Little Big Horn river to irrigate 856 acres of white owned land. What right did the Secretary of the Interior have to give away this water to a private corporation? The contract itself (R. 373) says that the Bozeman Trail Ditch Company is a corporation organized and existing under the laws of the State of Montana. How can the Secretary of the Interior grant water to white land owners under the Bozeman Trail Ditch, a private ditch, and deny it to white land owners under the Tschirgi Ditch, a private ditch? How can the Secretary of the Interior grant water to the Indian land owners under the Bozeman

Trail Ditch and deny it to the Indian land owners under the Tschirgi Ditch? Is this the "**just and equal distribution**" provided for by the act of February 8, 1887 (24 Stat. L. 388)? Is this equality? If there has been a shortage of water for the government projects for many years, as claimed by appellant, why were additional lands placed under the Bozeman Trail Ditch in 1922? Why were white men given water out of that ditch? If there is such a shortage of water, why didn't plaintiff stop the Wyoming water users from taking the water? (R. 379.) Wyoming is outside the reservation and under the authority of the **Winters** case these diverters could be stopped. If proper use were made of the available waters, would there not be enough to irrigate all irrigable Indian allotted lands on the reservation?

The Department of the Interior and Congress recognize the fact that there is sufficient water to irrigate all the lands of these projects if the water is properly conserved. Congress in the Appropriation Act of August 9, 1937, (50 Stat. 580) appropriated $200,000.00 for the construction of dams on Lodge Grass Creek so as to store the water for these projects, and the General Appropriation Act of 1938 carries an additional $200,000.00 for the same purpose. When these dams are constructed, there should be sufficient water for all the irrigable land on the Little Big Horn River and Lodge Grass Creek.

THIS IS AN INJUNCTION SUIT.

Petitioner seeks to restrain the respondents **"from in any manner diverting the waters of Lodge Grass Creek and the Little Big Horn River."** (Plaintiff's Bill of Complaint, R. 28.) If the respondents, or any of them, are entitled to **any** water the action must fail as to them.

We contend that the petitioner has failed to establish a cause of action against any of the respondents.

Defendants M. H. Tschirgi and Bertha Tschirgi.

The trial Court found that the plaintiff had failed to establish a cause of action against M. H. Tschirgi and Bertha Tschirgi who were improperly joined as party defendants and decreed that this cause of action be dismissed as to them. (R. 249, 250.) The evidence sustains such a finding and decree.

In conclusion we believe that the evidence establishes facts to warrant the following conclusion of law:

That at all times the Indians of the Crow Tribe were vested with the land and the waters of the reservation;

That this was a common right until the allotment of the lands to individual Indians and then the right to the use of the water necessary for the proper irrigation of the irrigable lands of each allotment became

vested in the Indian allottee, with a priority of May 7, 1868, subject to equal distribution of the available water to the total irrigable lands of the reservation;

That the Indian predecessors of the defendants were allotted the lands described in the answer:

That the United States conveyed these lands to the defendants, or their predecessors, by patents which included the water and water rights appurtenant to the land;

That these defendants, by mesne conveyance, are now the owners of the lands and water claimed by them in their answer, with as full a right thereto as their predecessors, including the Indian allottees;

That the Secretary of the Interior had no power or authority to grant water or water rights to one Indian's land or take such rights away from another Indian's land;

That the Secretary of the Interior has made no attempt to determine what lands on the Crow Reservation are entitled to water;

That the construction of the United States Indian Irrigation Service Ditches was for the purpose of conveying the water appurtenant to the lands lying under such ditches to such lands and was not an adjudication that such lands were legally entitled to such water, or that lands not under such ditches were not entitled to water.

That the Indian predecessors of these respondents were entitled to sufficient water to irrigate the irri-

gable lands of defendants as described in their answer provided there was sufficient water in the streams for such purpose and if there was not sufficient water then they were entitled to their pro rata share of such available water divided among the total irrigable land on the reservation;

That these defendants are now vested with all the rights of their Indian predecessors, including the right to sufficient water to irrigate such lands to the same extent as was such Indian; and

That plaintiff has failed to introduce facts to justify it to any relief as against these defendants.

For a brief, clear, apt and logical brief in support of respondents' case, we could do no better than cite Judge Pray's decision in this case which is found at page 253 of the Record. The decision sets forth the facts and the law, and we wish to incorporate it as a part of our brief.

WHEREFORE, it is respectfully requested, that the decree of the court below be affirmed.

T. H. BURKE,

Attorney for Respondents.

Billings, Montana,
November 8, 1938.

SUPREME COURT OF THE UNITED STATES.

No. 102.—October Term, 1938.

The United States of America, Petitioners, *vs.* Thomas R. Powers, et al.	Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[January 9, 1939.]

Mr. Justice McReynolds delivered the opinion of the Court.

By this proceeding (begun in 1934) the United States seek to prevent further taking of water from certain non-navigable streams within the Crow Indian Reservation. This water is essential to the cultivation of respondents' lands allotted more than twenty years ago to members of the tribe and presently held under properly acquired fee simple titles. The prayer of the bill is for a permanent injunction against "maintaining or using said dams and ditches, as aforesaid, and from diverting by means of said dams and ditches or in any other manner any of the waters from Lodge Grass Creek or Little Big Horn River and their tributaries; . . . ."

The decree of the Circuit Court of Appeals dismissing the bill must be affirmed.

By Treaty of May 7, 1868 [15 Stat. 649, 650-651] the United States set aside a large tract of arid land now within the State of Montana as a Reservation for the "absolute and undisturbed use and occupation" of Crow Indians, and they undertook to make their permanent homes thereon. It provides that whenever an individual Indian desires "to commence farming" he may select land, under stated conditions, which thereupon shall "cease to be held in common, but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it." Also—

"The President may at any time order a survey of the reservation, and, when so surveyed, Congress shall provide for protecting the rights of settlers in their improvements, and may fix the char-

acter of the title held by each. . . . When the head of a family or lodge shall have selected lands and received his certificate as above directed, and the agent shall be satisfied that he intends in good faith to commence cultivating the soil for a living, he shall be entitled to receive seeds and agricultural implements for the first year in value one hundred dollars, and for each succeeding year he shall continue to farm, for a period of three years more, he shall be entitled to receive seeds and implements as aforesaid in value twenty-five dollars per annum."

The Treaty contains no definite provision concerning apportionment or use of waters. Although the lands are arid a considerable area is susceptible of cultivation under irrigation.

The Act of Congress approved April 11, 1882 [Ch. 74, 22 Stat. 42, 43] refers to "an agreement for the sale to the United States [by the Crows] of a portion of their said reservation, and for their settlement upon lands in severalty," etc. In return the United States agreed to survey the remaining lands and divide them among members of the tribe; also "to issue patents to us respectively, therefor, so soon as the necessary laws are passed by Congress." Section 2—

"That the Secretary of the Interior be, and he is hereby, authorized to cause to be surveyed a sufficient quantity of land on the Crow Reservation to secure the settlement in severalty of said Indians as provided in said agreement, and upon the completion of said survey he shall cause allotments of land to be made to each and all of the Indians of said Crow tribe in quantity and character as mentioned and set forth in the agreement above named, and upon the approval of said allotments by the Secretary of the Interior he shall cause patents to issue to each and every allottee for the lands so allotted, with the same considerations, restrictions, and limitations mentioned therein as are provided in said agreement."

The Act of February 8, 1887 [Ch. 119, 24 Stat. 388, 389-390] provides for allotments in severalty to Indians upon any reservation created for their use whenever in the President's opinion any part is advantageous for agricultural and grazing purposes. And it directs that after allotments are approved the Secretary of the Interior shall issue patents declaring the United States will hold the land for twenty-five years in trust and thereafter "will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever . . . ." Section 7—

"That in cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for

agricultural purposes, the Secretary of the Interior be, and he is hereby, authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations; and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor."

The Act of March 3, 1891 [Ch. 543, 26 Stat. 989, 1040] mentions another conveyance by the Crows to the United States and appropriates $200,000 to be expended under direction of the Secretary of the Interior for irrigation in the valleys of the Big Horn and Little Big Horn Rivers and on Pryor Creek, within the diminished Reservation.

The Act of May 8, 1906 [Ch. 2348, 34 Stat. 182, 183] authorizes the Secretary of the Interior to issue to Indian allottees patents in fee simple "and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed . . . ." Also—

"Hereafter when an allotment of land is made to any Indian, and any such Indian dies before the expiration of the trust period, said allotment shall be cancelled and the land shall revert to the United States, and the Secretary of the Interior shall ascertain the legal heirs of such Indian, and shall cause to be issued to said heirs and in their names, a patent in fee simple for said land, or he may cause the land to be sold as provided by law and issue a patent therefor to the purchaser or purchasers, and pay the net proceeds to the heirs, or their legal representatives, of such deceased Indian. The action of the Secretary of the Interior in determining the legal heirs of any deceased Indian, as provided herein, shall in all respects be conclusive and final."

Commencing in 1901 allotments in severalty of tracts abutting or adjacent to the Little Big Horn River or Lodge Grass Creek were made to respondents' Indian predecessors. These culminated in the issuance of fee simple patents as provided by Act of May 8, 1906.[1] Each patent undertook to convey the land "together with all the rights, privileges, immunities and appurtenances, of whatsoever nature, thereunto belonging," but contained no express provision concerning water rights. Respondents have succeeded to the interest of the original allottees either by mesne conveyances or by purchase at government sales of deceased allottees' lands.

The Little Big Horn River and its affluent, Lodge Grass Creek, under normal conditions may afford sufficient water to irrigate

[1] Ch. 2348, 34 Stat. 182.

twenty thousand acres within the Reservation. Through private ditches respondents and their predecessors have long conveyed water from these streams in order to irrigate their lands and thus render them susceptible of cultivation. It is not suggested that water therefor can be obtained from any other source.

Petitioners maintain—

That prior to 1885, the United States commenced construction of irrigation works intended to divert waters from the streams in question. These gradually developed into a system normally capable of carrying sufficient water to irrigate 20,000 acres.[2] None of respondents' lands lie within the ambit of these projects; and neither the original allotments nor the patents specifically granted the use of any water.

That Congress gave the Secretary of the Interior control of Reservation waters. Irrigation projects initiated under his authority prior to allotments of respondents' lands sufficed to dedicate and reserve sufficient water for full utilization of these projects; rights acquired by the allottees were taken subject to this reservation.

That because of drought during 1931 to 1934, and respondents' diversion of waters upstream from the projects so initiated, the available water became insufficient properly to irrigate some 8,000 acres lying therein and under cultivation. Accordingly the injunction should be granted; all waters from the two streams had been devoted to those and similarly situated lands so far as necessary for farming operations.

Respondents maintain that under the Treaty of 1868 waters within the Reservation were reserved for the equal benefit of tribal members (*Winters* v. *United States*, 207 U. S. 564) and that when allotments of land were duly made for exclusive use and thereafter conveyed in fee, the right to use some portion of tribal waters essential for cultivation passed to the owners.

The respondents' claim to the extent stated is well founded.

Manifestly the Treaty of 1868 contemplated ultimate setlement by individual Indians upon designated tracts where they could make homes with exclusive right of cultivation for their support and with expectation of ultimate complete ownership. Without water productive cultivation has always been impossible.

We can find nothing in the statutes after 1868 adequate to show

[2] See Act of March 1, 1899, Ch. 324, 30 Stat. 924; Act of May 31, 1900, Ch. 598, 31 Stat. 221; Act of April 27, 1904, Ch. 1624, 33 Stat. 352.

Congressional intent to permit allottees to be denied participation in the use of waters essential to farming and home making. If possible, legislation subsequent to the Treaty must be interpreted in harmony with its plain purposes.

The Secretary of the Interior had authority [Act 1887] to prescribe rules and regulations deemed necessary to secure just and equal distribution of waters. It does not appear that he ever undertook so to do. Certainly he could not affirmatively authorize unjust and unequal distribution. The statute itself clearly indicates Congressional recognition of equal rights among resident Indians.

Adoption by the Secretary of plans for irrigation projects to serve certain lands was not enough to indicate a purpose to exclude all other land from participation in essential water and thereby destroy the equal interest guaranteed by the Treaty. Subsequent allotments for farming followed by patents negative any such notion. The patented lands had no value for agriculture without water; they were selected for homes and individual farming.

The petitioners have shown no right to the injunction asked. We do not consider the extent or precise nature of respondents' rights in the waters. The present proceeding is not properly framed to that end.

The challenged decree must be affirmed.

Mr. Justice REED took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.